Supreme Court, U.S.
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No. 91-1203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HEWLETT-PACKARD COMPANY,

Petitioner,

v.

DATAGATE, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

In this antitrust case, should the Court vacate the judgment below with respect to the claims left remaining by the court of appeals, so as to allow a remand after issuance of this Court's upcoming decision in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, No. 90-1029 (argued and submitted Dec. 10, 1991), which presents identical legal issues and operative facts with respect to relevant market definition and market and monopoly power?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of this petition identifies all parties in the court of appeals. Petitioner Hewlett-Packard Company has no parent corporation and no subsidiary corporations other than wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is reported at 941 F.2d 864 (9th Cir. 1991), and is reprinted in the appendix hereto ("Pet. App.") beginning at Pet. App. 1a. The court of appeals' order denying Hewlett-Packard Company's petition for rehearing is not reported, and is reprinted here at Pet. App. 60a. Its order withdrawing this case from submission pending a decision in *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, No. 88-2686 (9th Cir.), is not reported, and is reprinted here at Pet. App. 15a. Its order requesting briefing on the impact, if any, of the panel's decision in that case on the present case is not reported, and is reprinted here at Pet. App. 16a. Its order resub-

mitting this case is not reported, and is reprinted here at Pet. App. 17a.

Pursuant to Rule 14(k)(2) of the Rules of this Court, all opinions and orders of the district court are reprinted in the appendix hereto, in order of their pertinence to the issues presented in this petition. The district court's Order Granting Motion for Summary Judgment is reported at 1989-2 Trade Cas. (CCH) ¶ 68,786 (N.D. Cal. 1988), and is reprinted here beginning at Pet. App. 18a. Its Order Granting Stipulated Motion to Dismiss and to Strike is not reported, and is reprinted here beginning at Pet. App. 30a. Its Order Dismissing First Amended Complaint is not reported, and is reprinted here beginning at Pet. App. 32a. Its Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment is reported at 672 F. Supp. 1288 (N.D. Cal. 1987), and is reprinted here beginning at Pet. App. 35a. Its Order Continuing Motion and Ordering Additional Briefing on New Evidence is not reported, and is reprinted here beginning at Pet. App. 45a. Its Order Dismissing Complaint is not reported, and is reprinted here beginning at Pet. App. 51a. Its Order Denying Motion for Disqualification is not reported, and is reprinted here beginning at Pet. App. 53a. Its Order of Clarification re Pendent State Claims is not reported, and is reprinted here beginning at Pet. App. 58a.

JURISDICTION

The judgment of the court of appeals was filed on August 7, 1991 (Pet. App. 1a), and a timely-filed petition for rehearing was denied by order dated October 28, 1991 (Pet. App. 60a). This petition is being

filed within 90 days of that order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 16 of the Clayton Act, 15 U.S.C. § 26. Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred fifty thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred fifty thousand dollars, or by impris-

onment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 16 of the Clayton Act provides:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections thirteen, fourteen, eighteen and nineteen of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of Title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall

award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

STATEMENT OF THE CASE

A. Introduction

Respondent Datagate, Inc. ("Datagate") brought this private antitrust action against petitioner Hewlett-Packard Company ("HP"), alleging unlawful monopolization under Section 2 of the Sherman Act and unlawful tying under Section 1 of that Act, and seeking treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, and injunctive relief under Section 16 of that Act. The district court dismissed Datagate's tying claim pursuant to Fed. R. Civ. P. 12(b)(6) and, in a series of orders, granted summary judgment against the monopolization claim. The court of appeals affirmed with respect to Datagate's damages claim for monopolization, but reversed with respect to the tying claim and remanded for further findings with respect to one part of the injunctive relief claim for monopolization.

In this petition, HP requests that the decision below be vacated and remanded with respect to Datagate's claims left remaining by the court of appeals, so that the court of appeals may reconsider those claims after and in light of this Court's impending decision in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, No. 90-1029, which was argued and submitted on December 10, 1991. The central issues in and operative facts of *Kodak*, as it came before this Court, and of this case are the same with respect to certain market definition and market/monopoly power elements of the tying and monopolization offenses. The basic issue in both cases as they stand for purposes of this petition

is whether an equipment manufacturer's undisputed lack of market power in the interbrand market for equipment sales precludes it from exercising market or monopoly power in alleged aftermarkets (e.g., parts or service) for its own brand of equipment.

Kodak is plainly relevant to the market issues in this case, as the court below appeared to recognize in two of its orders. *See* Pet. App. 15a, 16a. HP requests that this Court vacate and remand so that the court below may properly consider the remaining market issues in this case after *Kodak* has been decided by this Court.

B. The Parties, the Industry and Datagate's Claims

As the numerous opinions and orders of the district court show, Datagate raised a broad variety of claims and alleged facts in this case. We discuss here, however, only those matters necessary for resolution of the question presented by this petition.

1. HP manufactures and sells computer systems in competition with many firms, including most prominently IBM and Digital Equipment Corporation ("DEC"). HP also repairs and maintains the computers it manufactures, a service essential to customer use and satisfaction and thus to HP's viability and success in the computer industry. Service for HP computers is also provided by users themselves and by independent service organizations ("ISOs").

HP presented uncontroverted evidence below that its share of the interbrand market for minicomputer[1] sales has never exceeded 8.1% and that it lacks mar-

[1] Only minicomputers, a class of medium-size computers, are directly relevant to this case.

ket power in that interbrand market. HP also presented uncontroverted evidence that (1) there is a close relationship between service prices and the total cost of ownership of minicomputers; (2) total cost of ownership, service pricing and service quality are all critical factors in customers' minicomputer purchase decisions; and (3) the importance of those factors to minicomputer purchase decisions constrains HP with regard to its service pricing and practices.

2. Datagate is an ISO that has chosen to specialize in servicing certain HP minicomputers. Its primary claim, as stated in its original complaint, was that HP had monopolized or attempted to monopolize an alleged market "for the maintenance and repair of HP hardware systems" in violation of Section 2 of the Sherman Act. In its amended complaint, Datagate added a tying claim under Section 1 of the Sherman Act, alleging a tie between HP software service and hardware service. However, Datagate never alleged in any of its three complaints (the last two having been filed after extensive discovery) that HP has market or monopoly power in the pertinent interbrand market, i.e., the market for minicomputers. Despite full discovery, Datagate proffered no record evidence that HP has such power and in effect conceded that HP lacks it.

3. The claim for injunctive relief at issue in this petition relates to a matter that did not affect Datagate and that Datagate raised only after the district court had dismissed or granted summary judgment against the great bulk of its case. That matter was HP's decision, effective August 1, 1987, no longer to guarantee four-hour response time for repair or maintenance service to its time-and-materials ("T&M") ser-

vice customers. Most HP service customers purchase service contracts under which, for a fixed monthly fee, they receive a variety of support services, including guaranteed response time for repair and maintenance. Some HP users purchase service from HP on a per-incident or T&M basis, where the charge is calculated by service time plus materials used. HP's standard response time for T&M service is within three business days of a user's call but, unlike any other major computer manufacturer, HP also offered T&M customers within 100 miles of an HP field office the option to purchase a four-hour response guarantee for an additional fee. Because this offering was uneconomic and required HP to maintain excess capacity at field service offices, HP modified this offering effective August 1, 1987 to provide expedited, guaranteed T&M response within the next business day (subject to local availability) for the same additional fee.

Datagate sought damages as a result of the T&M change and injunctive relief against it. Datagate did not contend that it had lost any actual or prospective business as a result of the T&M change. Such a contention would have been foreclosed by Datagate's own service contracts, which did not contain any provision allowing Datagate service customers to rely on T&M service from HP and in fact prohibited the assignment of service work to third parties such as HP. The only arguable assertion of injury to Datagate from the T&M change was the hearsay report of its sales manager that four of its customers had "expressed their concerns" about the change.

4. Datagate's tying claim relates to a different matter. In its first and second amended complaints, Da-

tagate claimed, on the basis of alleged statements by HP employees to two users, that "HP has represented to HP systems users that HP will not service the user's software if the user contracts with a third party for hardware maintenance." However, Datagate never alleged that either of those users or anyone else accepted this purported condition or that the purported restraint in fact existed. To the contrary, it admitted in its first and second amended complaints that "HP retreated from its position and stated that it would provide software service even if hardware service was provided by a third party."

C. Course of Proceedings and Disposition Below

1. Datagate filed its original complaint on January 10, 1986, alleging only actual or attempted monopolization under Section 2 of the Sherman Act. The district court dismissed with prejudice Datagate's principal claim that HP's reservation of rights to modify its policy of providing ISOs with all parts, documentation and services on the same terms as HP made them available to its own end user customers constituted a threatened cut-off of allegedly essential facilities. Pet. App. at 51a. Datagate did not appeal from that ruling. The court also dismissed the remainder of Datagate's complaint, which involved certain other alleged HP conduct occurring in 1984 and 1985, with leave to amend so that Datagate could plead that such alleged conduct had impaired or would impair competition "beyond mere economic harm to plaintiff." Pet. App. at 52a.

2. In its first amended complaint, Datagate amended its monopolization claim and added a new tying claim, described *supra* at 8-9. The district court dismissed the amended monopolization claim because

Datagate still had not "adequately pled the injury to competition that is the heart of these claims." Pet. App. at 33a. It dismissed the new tying claim because Datagate had failed to plead actual coercion of buyers under a per se theory or, alternatively, injury to competition under a rule of reason theory. *Id.* The court granted Datagate leave to amend each of these claims.

3. During the pendency of the original and first amended complaints, Datagate received extensive document and deposition discovery from HP and third parties.[2] Datagate thereafter filed its second amended complaint, the tying claim of which (even after such extensive discovery) was identical—word-for-word—to its original tying claim. Pursuant to the parties' stipulated motion,[3] the district court dismissed Datagate's tying claim with prejudice. Pet. App. at 30a. The parties proceeded with further discovery on Datagate's monopolization claim, following which HP moved for summary judgment on two grounds: (1) Datagate's failure to raise a triable issue as to its market definition limited to the repair and maintenance of HP minicomputers; and (2) its failure to raise a triable issue that HP's alleged conduct had injured competition. The district court denied without discussion HP's motion as to the relevant market issue. Pet. App. at 38a. The court granted HP's motion as to the injury to competition issue insofar as Datagate was relying on the assertion that HP's alleged conduct had injured competition from existing competi-

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[2] Datagate has never claimed that it was denied any discovery necessary to develop its case.

[3] Datagate repleaded its tying claim to preserve its position for appeal.

tors, but denied HP's motion insofar as Datagate was relying on the assertion that HP's alleged conduct had had "a chilling effect on potential entrants." Pet. App. at 41a, 43a-44a.

HP moved for reconsideration or, alternatively, dismissal of the chilling effect claim on the ground that, as an existing competitor, Datagate could not have suffered antitrust injury from any such chilling and therefore lacked standing to pursue such a claim. In response, Datagate filed its own motion for reconsideration based in part on the newly raised August 1, 1987 T&M change. The district court granted summary judgment for HP on all claims and entered judgment for HP. As to the alleged chilling of potential entrants, it held that Datagate lacked antitrust standing to pursue such a claim because, "[i]f H-P's conduct kept competitors out of the relevant market—whatever that market is—it is evident that Datagate benefitted from the exclusion." Pet. App. at 21a. As to the T&M change, it held, "after careful review of all the evidence presented by Datagate," that "Datagate ha[d] failed to offer any proof" that that change caused any injury to Datagate. Pet. App. at 28a.[4]

4. The court of appeals affirmed in part, reversed in part and remanded. It affirmed summary judgment with respect to Datagate's monopolization claim based on alleged HP conduct occurring prior to August 1,

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[4] In a subsequent order, the district court dismissed Datagate's pendent state law claims for want of subject matter jurisdiction. Pet. App. at 58a. Datagate thereupon filed its state claims in state court. In another subsequent order, the district court denied Datagate's motion for an order disqualifying the District Court Judge under 28 U.S.C. § 455(a). Pet. App. at 53a.

1987. Pet. App. at 6a. And it affirmed summary judgment against Datagate's claim for damages based upon the August 1, 1987 T&M change in light of the facts that (1) "not a single contract produced by Datagate contained" a term allowing Datagate's customers to rely on four-hour T&M response by HP and at least two Datagate contracts forbade the delegation of work to third parties; and (2) "there is no evidence that Datagate lost any contracts as a result of the new policy." Pet. App. at 8a.

The court of appeals remanded, however, for further findings on Datagate's claim for injunctive relief against the T&M change. According to the court below, "the district court only considered the evidence with regard to actual injury, and did not consider the *threat* of loss or damage to Datagate." Pet. App. at 9a-10a (emphasis in original). The court of appeals instructed the district court to determine on the basis of the existing record whether Datagate had raised a triable issue of a threat of injury resulting from the T&M change sufficient to warrant injunctive relief. *Id.*

The Ninth Circuit also reversed the Rule 12(b)(6) dismissal of Datagate's tying claim. The court held that Datagate's allegations that HP employees had represented to two users that HP would not service their software if it did not also service their hardware "may be read as asserting that in at least two cases customers accepted the tied-in hardware service because of these threats." Pet. App. at 11a. It further held that, even if not enough to state a per se tying claim, these allegations were "certainly sufficient to state a claim under the rule of reason" because "[i]f effectively enforced, such a tie-in would likely have

a significant impact on competition in the market for HP hardware service." *Id.*

Finally, the court of appeals denied HP's request to affirm on the basis of a ground not relied on by the district court, i.e., the absence of a triable issue on Datagate's market definition limited to repair and maintenance of HP minicomputers. In doing so, the court relied on the fact that another panel of the same court had "recently held that the existence of a separate market for service presented a material issue of fact," citing *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 615-16 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2823 (1991) (argued and submitted Dec. 10, 1991). In relying on the Ninth Circuit panel's decision in *Kodak*, however, the court below failed to acknowledge this Court's grant of certiorari in that case, of which it had been advised.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari and vacate the judgment below as to those claims left remaining by the court of appeals so that the court of appeals may consider those claims in light of this Court's upcoming decision in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, No. 90-1029 (argued and submitted Dec. 10, 1991). As presented to this Court, this case and *Kodak* involve identical issues and operative facts regarding market definition and market/monopoly power.

The issue in *Kodak*, as presented to this Court, is whether Kodak's undisputed lack of market power in the interbrand markets for copier and micrographic equipment sales precludes Kodak from exercising (1) market power over Kodak replacement parts suffi-

cient to maintain a tying claim or (2) monopoly power over service of Kodak equipment sufficient to maintain a monopolization claim. *See* Pet. for Writ of Cert. at i, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, No. 90-1029 (Dec. 20, 1990). The identical issue is presented in this case. Datagate never alleged in any of its three complaints that HP has market power in the interbrand market for minicomputer sales and, even after full discovery, did not controvert HP's showing that HP lacked such power. Rather, it contended, as did respondents in *Kodak*, that there is a separate market for service of one manufacturer's equipment because users allegedly become "locked in" to that equipment after purchase.

HP made its lack of interbrand market power the centerpiece of its summary judgment motion, arguing that the lack of such power precluded a relevant market definition limited to service of HP minicomputers and therefore a finding that HP has monopoly power over service of its minicomputers. HP also raised this issue in the court of appeals, arguing as an independent basis for affirming the district court's judgment that there could not be a relevant market or submarket limited to servicing its minicomputers, since the computers themselves were sold in a market where HP did not come close to having market power; therefore, HP could not have monopoly power in any derivative aftermarket for service.

The same analysis applies to the tying claim. *Kodak* presented to this Court the issues whether Kodak's undisputed lack of interbrand market power precludes a finding that it has market power in a derivative aftermarket for Kodak replacement parts, the alleged tying product market, and indeed whether a tying

product market limited to one manufacturer's parts can exist at all. The same issues are presented here, namely, whether HP's undisputed lack of interbrand market power over minicomputer sales precludes a finding that it has market power in a derivative aftermarket for software service for HP minicomputers, the alleged tying product market, and whether a tying product market limited to such service can exist.[5]

In light of the identity of legal issues and operative facts in *Kodak* and this case, the Court should grant this petition and vacate the judgment below as to the injunctive relief and tying claims[6] so that the court

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[5] The court of appeals appeared to recognize the relevance of *Kodak* to this case. *Kodak* had been argued and submitted to a different panel of the Ninth Circuit at the time this case was argued below. At oral argument, counsel for HP noted the similarities between the two cases with regard to the market definition and market/monopoly power issues and suggested that the court defer its decision pending the *Kodak* panel's then-upcoming decision. The court agreed, withdrawing the case from submission pending the *Kodak* panel's decision. Pet. App. at 15a. Later, the court requested briefing on the impact, if any, of the *Kodak* panel's decision on this case. Pet. App. at 16a. HP apprised the court below of this Court's grant of certiorari in *Kodak* to consider the market definition and market/monopoly power raised therein. After being so advised, however, the court below nevertheless issued its opinion, relying on the panel decision in *Kodak* to hold that the relevant market issue was a triable question of fact while failing to acknowledge the grant of certiorari to consider that same question.

[6] There is no basis for vacating the judgment below with respect to the issues on which the court below affirmed the judgment for HP, because the grounds for affirmance do not relate to the market issues presented and will not be affected by this Court's decision in *Kodak*.

of appeals may consider those claims in light of the upcoming decision in *Kodak*.

> Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari had been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument, or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision.

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 221 (6th ed. 1986). The Court routinely follows this practice. *See id.* at 279 ("[i]n most such situations, the certiorari papers are held by the Court pending its plenary ruling, following which the summary reconsideration order is entered").[7] It should do the same here.

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[7] In the 1990 Term, the Court issued approximately 75 orders granting petitions for certiorari, vacating the judgments below and remanding for reconsideration in light of a Court decision rendered after those judgments. Many such orders were in response to requests by petitioners or parties supporting them. *E.g., Director, Office of Workers' Compensation Programs, United States Dep't of Labor v. Robinette*, 111 S. Ct. 2880 (1991); *Peabody Coal Co. v. Martin*, 111 S. Ct. 2880 (1991) (request by Federal Respondent). In the current Term, the Court has granted at least two requests for such relief. *New York State Dep't of Health v. Andrulonis*, 112 S. Ct. 39 (1991); *Helling v. McKinney*, 112 S. Ct. 291 (1991).

CONCLUSION

For the foregoing reasons, the judgment below should be vacated as to Datagate's tying claim and its claim for injunctive relief based on the August 1, 1987 T&M change, and the case should be remanded for reconsideration of those claims in light of the Court's upcoming decision in *Kodak*.

Respectfully submitted,

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Date: January 27, 1992

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-15293

D.C. No. CV-86-20018-RPA

Datagate, Inc., a corporation,
Plaintiff-Appellant,

v.

Hewlett-Packard Company, a corporation,
Defendant-Appellee.

OPINION

Appeal from the United States District Court for the Northern District of California Robert P. Aguilar, District Judge, Presiding

Argued and Submitted October 3, 1989
Submission Deferred November 22, 1989
Resubmitted July 30, 1991
San Francisco, California

Filed August 7, 1991

Before: Alfred T. Goodwin, Mary M. Schroeder and Robert R. Beezer, Circuit Judges

Opinion by Judge Beezer

OPINION

BEEZER, Circuit Judge:

Datagate, Inc. ("Datagate") appeals the district court's order granting summary judgment for defendant Hewlett-

Packard Company ("HP") and denying Datagate's motion for disqualification of the district judge in an underlying action in which Datagate brought claims against HP for violation of the Sherman Antitrust Act. We reverse the district court's judgment with respect to Datagate's claim for injunctive relief and remand for a determination of whether Datagate has shown a "threatened loss or damage by a violation of the antitrust laws." We also reverse and remand with respect to the dismissal of Datagate's pleading of an illegal tie-in. We affirm the district court's judgment on all other counts.

I

Datagate is one of approximately ten independent service organizations ("ISOs") that provide service and repair for Hewlett-Packard computer hardware. In addition to manufacturing and selling this equipment, HP also competes with the ISOs for the service and repair business. The parties agree that HP cooperated with the ISOs between 1978, when Datagate was formed, and 1983 by supplying the parts, service and information required by the ISOs. Datagate alleges, however, that beginning in 1983 HP initiated a plan of unfair competitive practices in violation of section two of the Sherman Antitrust Act. These alleged practices include restricting ISO access to parts, service and information formerly provided by HP, using its new "ISO policy" as a sales tool to dissuade customers from contracting with ISOs, and making disparaging remarks to customers about Datagate.

Datagate filed suit on January 10, 1986, seeking treble damages under section four of the Clayton Act based on HP's alleged violation of section two of the Sherman Antitrust Act for monopolization and attempted monopolization, as well as use of an illegal tie-in. Additionally, Datagate sought injunctive relief under section 16 of the Clayton Act, and other relief pursuant to its pendent state law claims.

On September 22, 1986, the district court dismissed Datagate's illegal tie-in claim on the grounds that Datagate failed to allege sufficient facts to show "coercion" or injury to competition. On August 31, 1987, the court granted partial summary judgment on the Sherman Act section two claims, ruling that Datagate failed to raise a triable issue of fact as to whether HP's conduct had harmed competition by injuring existing ISOs. However, the court further ruled that there were triable issues of fact regarding the definition of the relevant market and injury to competition due to the chilling effect of HP's conduct on potential competition from new entrants into the ISO market. The parties each filed motions for reconsideration of the summary judgment ruling. In support of its motion, Datagate submitted evidence of injury to existing competition resulting from HP's change in its "four hour response" service policy as of August 1, 1987. Under its new policy, HP will no longer provide such service to users who hired ISOs to provide the primary maintenance for their hardware.

The court construed HP's motion for reconsideration as a new motion for summary judgment on antitrust standing grounds. It apparently construed Datagate's as a motion to amend the complaint to add facts relating to HP's new four-hour response service policy. After additional briefing, on July 11, 1988, the district court granted summary judgment to HP on the grounds that as an existing competitor Datagate lacked standing to sue based on injury to potential competition. The court further ruled that, although Datagate had raised a triable issue of fact with respect to injury to competition resulting from HP's new "four-hour response" service policy, it had failed to show any injury to itself as a result of the policy. Therefore, Datagate lacked standing to sue on that issue as well. The district court granted summary judgment against Datagate on all federal antitrust claims, and dismissed all pendent state law claims for lack of subject matter jurisdiction.

Following entry of the judgment, Datagate moved to disqualify Judge Aguilar and set aside the judgment based on his son's employment with HP. On August 11, 1988, the court denied the disqualification motion. Notice of appeal was filed on September 9, 1988.

II

We review a grant of summary judgment de novo. *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1171 (9th Cir. 1988). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). "Although summary judgment generally is disfavored in antitrust litigation, it is appropriate when the nonmoving party does not show any issues of material fact and does not present an adequate record to support a finding in his favor." *Christofferson Dairy*, 849 F.2d at 1171.

Section four of the Clayton Act provides in part: "[a]ny person who is injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." 15 U.S.C. § 15 (1988). The Supreme Court has interpreted this section to require a showing of antitrust injury. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The Court described antitrust injury as

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'

Id. (quoting *Zenith Radio Corp v. Hazeltine Research*, 395 U.S. 100, 125 (1969)). In following *Brunswick*, we have held that

> [§ 4 of the Clayton Act] confers standing to sue only upon those persons causally injured by antitrust violations .... Moreover, in order to prevail the plaintiff must prove not only injury causally linked to the asserted violation, but also that the injury is of the type the antitrust laws were intended to prevent .... Accordingly, the plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond his own loss of business or the market's loss of a competitor.

Cal. Computer Products v. International Business Machines, 613 F.2d 727, 732 (9th Cir. 1979) (citations omitted). Our recent decision in *Image Technical Service v. Kodak*, 903 F.2d 612 (9th Cir. 1990), is not inconsistent. In fact, in that case we noted that "[t]he cases also identify the standing requirement of 'causal antitrust injury.' Kodak does not dispute appellants' standing to bring its section 2 claim." *Id.* at 619 n.6.

In *Atlantic Richfield Co. v. USA Petroleum* the Supreme Court recently reiterated its holding that section four requires a showing of antitrust injury and that "[a]ntitrust injury does not arise for purposes of § 4 of the Clayton Act ... until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct ...." 110 S. Ct. 1884, 1892 (1990) (emphasis in original). The Court further emphasized that it has "adhered to this principle *regardless of the type of antitrust claim involved.*" *Id.* (emphasis added).

In *Cal. Computer Products*, we stated that there are "three essential elements to a successful claim of § 2 monopolization:

(a) the possession of monopoly power in the relevant market;

(b) the willful acquisition or maintenance of that power; and

(c) causal 'antitrust' injury."

613 F.2d at 735. The third element is antitrust standing. See *id.* at 736.

Datagate failed to demonstrate causal "antitrust" injury and thus failed to meet its burden of establishing standing. Datagate alleged an antitrust injury as a result of HP's disparaging remarks and the use of its ISO policy. According to Datagate, HP's abnormally high service prices and abnormally high profits demonstrate an injury to competition. Datagate offered expert evidence that service prices for HP products are higher than those for comparable IBM and DEC products. However, Datagate failed to show that HP service prices had increased during the period in question. Datagate also argued that HP profits are too high, yet it failed to supply any specific comparative profit figure.

On the other hand, HP supplied evidence showing that the number of ISOs servicing HP hardware actually increased during the relevant period. In fact, the only ISO to go out of business because of lost accounts actually lost its sole client to another ISO that had recently entered the market. Further, total sales for ISOs have continued to increase.

Finally, Datagate's own 1983-1987 Plan provides some explanation for the fewer number and smaller size of ISOs servicing HP products as compared to IBM and DEC products. As the Plan describes:

> During the past few years, a number of highly successful maintenance companies have grown up around the IBM and DEC marketplace. The pic-

> ture is quite different if one looks at HP. The reason for this is simple. Up to ten years ago, HP was involved mainly in the instrumentation field . . . Most third party maintenance companies are happy to maintain computer systems, which are based on digital circuitry, but shy away from instrumentation equipment based on analog circuitry.

In its comparisons of the HP service market with that of IBM and DEC products, Datagate now ignores the difference in the maturity of those markets despite its previous recognition.[1] Datagate has thus failed to demonstrate a causal "antitrust" injury in the form of abnormally high prices and profits.

Datagate did raise material issues of fact concerning two other antitrust injuries. However, it failed to show a causal connection between its own injuries and the alleged antitrust injuries. The two antitrust injuries were related to the chilling effect of HP's actions upon new entry by potential competitors and harm to existing competitors resulting from HP's new four-hour response service policy. Datagate was unable to show any injury to itself resulting from either the chilling of new entry or the four-hour response policy.

As an existing competitor, Datagate would have benefited from any chilling of new entry into the market. *See Matsushita Electric Industr. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986) (no antitrust injury from alleged conspiracy to charge supra-competitive prices because,

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[1] HP also attempts to raise the issue of relevant market definition. However, the denial of a motion for summary judgment is generally not appealable. *Simons v. United States*, 497 F.2d 1046 (9th Cir. 1976). Further, under similar facts, we recently held that the existence of a separate market for service presented a material issue of fact. *See Image Technical Services, Inc. v. Kodak*, 903 F.2d 612, 615-16 (9th Cir. 1990).

while such conduct would violate the Sherman Act, plaintiff-competitors could only gain from it); *Alberta Gas Chemicals Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1243 (3d Cir. 1987) (no antitrust injury from competitor's acquisition of a potential entrant because "elimination of a potential increase in output" would "inevitably aid[]" existing competitors), *cert. denied*, 486 U.S. 1059 (1988). Therefore, Datagate can claim no injury as a result of such chilling.

Further, its attempt to show injury from the four-hour response service policy amounts to a single declaration by Datagate sales manager Carol Ann Riberia that customers "often require the availability of HP four-hour response as a contract term." However, not a single contract produced by Datagate contained such a term. In fact, at least two of its contracts forbid the delegation of work to third parties. Significantly, there is no evidence that Datagate lost any contracts as a result of the new policy.[2]

A final antitrust injury asserted by Datagate is an injury to its ability to compete for new business. Datagate asserts that although the market for the services it was providing was expanding, HP's conduct limited Datagate's ability to compete for that expanding market. Although Datagate's asserted loss of business in the expanding market could constitute an antitrust injury, Datagate has failed to provide sufficient evidence in support of its expanding market theory to survive summary judgment.

Finally, Datagate argues that the conduct of HP should be considered as a whole in determining antitrust injury. However, Ninth Circuit caselaw clearly holds that to bring

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[2] Datagate's argument that the district court imposed an improper burden of proof is also without merit. The court clearly acted within the scope of its discretion in refusing to allow Datagate to file a third amended complaint where it had at no time in the two years of litigation established any antitrust injury. See Fed. R. Civ. P. 15(a) (After its first amendment, a party may amend again "only by leave of court.").

suit under the antitrust laws the "plaintiff's injury must 'reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.' " *Orion Pictures Distribution v. Syufy Enterprises.*, 829 F.2d 946, 948 (9th Cir. 1987) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489); *see also Cal. Computer Products v. International Business Machines*, 613 F.2d 727, 732 (9th Cir. 1979) (antitrust plaintiff must establish that it has been injured by conduct that has unlawfully harmed competition). Datagate's failure to show injury from a specific violation of the antitrust laws thus precludes its recovery.

Datagate has failed to demonstrate a causal "antitrust" injury. Any injury that Datagate may have suffered as a result of HP's disparaging remarks or its use of its ISO policy does not "reflect . . . the effect . . . of" nor was it "made possible by" a chilling of new entry or the new four-hour response service policy.

III

Although the district court entered final judgment in favor of HP, it actually failed to consider Datagate's claim for permanent injunctive relief under section 16 of the Clayton Act. In fact, there is absolutely no mention of the claim in the court's final order. Datagate was successful in raising triable issues of fact with regard to the definition of the relevant market, injury to competition, and intent to monopolize with respect to the August 1, 1987 change in HP's four-hour response service policy. Nevertheless, summary judgment was granted HP because of Datagate's failure to show that it has suffered actual injury as a result of the new policy. However, section 16 of the Clayton Act, 15 U.S.C. § 26, "invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of *'threatened injury.'* " *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 130 (1969) (emphasis added). Because the district court only considered the evidence with regard

to actual injury, and did not consider the *threat* of loss or damage to Datagate, we reverse and remand for the trial court to make such findings.

To establish a claim for injunctive relief under section 16, Datagate must demonstrate a "cognizable danger" of injury, not just a "mere possibility." *TRW, Inc. v. FTC,* 647 F.2d 942, 954 (9th Cir. 1981) (quoting *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953)). The record on appeal indicates that some of Datagate's customers have expressed concern over HP's new policy. While such concern does not show actual injury it may be indicative of a threat of injury. Datagate has also supplied evidence of harm already suffered by other ISOs as a result of the new policy. The district court should consider such evidence in determining whether it is sufficient to raise a triable issue of fact regarding the threat of harm to Datagate.

IV

Datagate did not specify whether it based its tie-in claim on a per se theory or on a rule of reason theory. A claim of a per se violation requires an allegation "that the seller of the tying product 'coerced' to some extent the purchaser into buying the tied product." *Airweld, Inc. v. Airco, Inc.,* 742 F.2d 1184, 1189 (9th Cir. 1984), *cert. denied,* 469 U.S. 1213 (1985). To state a claim based on the rule of reason, a plaintiff must allege an injury to competition. *See Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 29 (1984). The district court held that Datagate failed to state a claim under either theory. We disagree.

Fed. R. Civ. P. 8(a)(c) requires only "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests. *Conley v. Gibson,* 355 U.S. 41, 47 (1957). We review de novo a district court's dismissal of an action for failure to state a claim. *Shah v. County of Los Angeles,*

797 F.2d 743, 745 (9th Cir. 1986). "In conducting this review, we must assume the correctness of all the factual allegations made by [the plaintiff]." *Id.* Dismissal "is proper only if it is clear that the plaintiff could prove no set of facts within the framework of the complaint that would entitle him to relief. There is no special rule requiring more factual specificity in antitrust pleadings." *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981) (citations omitted). Therefore, the court must determine whether the plaintiff "could show any set of facts, consistent with the allegations of its complaint, that would constitute a violation of the antitrust laws." *Id.*

Datagate's allegations are sufficient to meet the liberal requirements of Fed. R. Civ. P. 8(a)(2). Datagate alleged that software and hardware service are separate products, that HP had monopoly power in the software service market, and that it threatened to withhold software service if customers did not also contract for hardware service. Datagate gave specific examples of such threats by HP and stated its belief that there were others. Its allegations may be read as asserting that in at least two cases customers accepted the tied-in hardware service because of these threats. Further, if not enough for a per se claim, it is certainly sufficient to state a claim under the rule of reason. If effectively enforced, such a tie-in would likely have a significant impact on competition in the market for HP hardware service.

V

Under 28 U.S.C. § 455(a), a judge is required to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The trial court's decision is reviewed under an abuse of discretion standard. *See United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989). The trial judge's decision may only be reversed where it represents "a clear

error of judgment." *Zepeda v. INS*, 753 F.2d 719, 725 (9th Cir. 1983).

"The test for disqualification under section 455(a) is an objective one: whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983). In applying this test "it is critically important . . . to identify the facts that might reasonably cause an objective observer to question [the judge's] impartiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988). Datagate argues that in this case the following "facts" require disqualification: (1) HP has employed the judge's son for the past fifteen years; (2) his son has a financial interest in HP's profit sharing plan; (3) the major newspapers in the Bay Area reported the story; (4) the judge failed to disclose his son's employment relationship with HP; and (5) in two other cases the judge has granted summary judgment motions in favor of HP.

However, in a case involving the same facts, the Federal Circuit applying Ninth Circuit law affirmed Judge Aguilar's refusal to disqualify himself. *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 882 F.2d 1556 (Fed. Cir. 1989), *cert. denied*, 110 S. Ct. 1125 (1990). As the court noted, an employment relationship between a judge's child and a party to the suit has not generally been held to merit per se disqualification. *Id.; see also In re Fox West Coast Theatres*, 88 F.2d 212, 226 (9th Cir.) (even if judge's son were employed by bankrupt, that fact would not disqualify judge from hearing bankruptcy proceedings), *cert. denied sub nom Talley v. Fox Film Corp*, 301 U.S. 710, *reh'g denied*, 302 U.S. 772 (1937), *cf. United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 463-64 (5th Cir. 1977) (the fact that the judge's son was an associate of the law firm representing defendant did not require recusal where the son did not actively participate in the case), *cert. denied*, 434 U.S. 1035, *reh'g denied*, 435 U.S. 918 (1978). Instead,

"[i]t is merely one factor to consider . . . ." *Hewlett-Packard,* 882 F.2d at 1569.

Here, as in *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, "other facts mollify the situation." 882 F.2d at 1569. The district judge's son is one of over 83,000 HP employees. He holds a nonmanagement position in a division that makes calculators, not the large computers involved in this case. Although, like all other HP employees with over six month's continuous employment, he participates in a profit sharing plan, it is reasonable to conclude that the outcome of this litigation will not affect either his employment or his financial interest in the company.

The fact that the judge's decision was reported in the newspapers is not persuasive of a public impression of partiality. *Id.; In re City of Detroit,* 828 F.2d 1160, 1168 (6th Cir. 1987) ("articles cited by the City do not necessarily mean that the public believes [the] Judge . . . is biased"). Additionally, the trial judge was not required to disclose to Datagate that his son was employed by HP. *Hewlett-Packard,* 882 F.2d at 1569. Section 455(e) and *Liljeberg* are not inconsistent with this position.

Further, the fact that the trial judge has granted summary judgments in favor of HP in other cases is not a basis for disqualification. *See Barnes v. United States,* 241 F.2d 252 (9th Cir. 1956). In fact, in at least one other case the judge has ruled against HP. *See Hewlett-Packard,* 882 F.2d at 1569.

Finally, even if the trial judge did abuse his discretion, Datagate waived its right to have the judgment vacated, by failing to move for disqualification in a timely fashion. *United States v. Conforte,* 624 F.2d 869 (9th Cir.), *cert. denied,* 449 U.S. 1012 (1980); *Ramirez v. United States,* 294 F.2d 277 (9th Cir. 1961). HP's counsel informed counsel for Datagate of the situation by letter dated June 22, 1988, while HP's summary judgment motion was *sub judice.*

Nevertheless, Datagate waited six weeks—one month after judgment had been entered—to file its motion.

Neither party shall recover costs.

AFFIRMED in part, REVERSED and REMANDED in part.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

C.A. No. 88-15293

D.C. No. CV-86-20018-RPA

DATAGATE, INC., a corporation,
Plaintiff-Appellant,

v.

HEWLETT-PACKARD CO., a corporation,
Defendant-Appellee.

FILED NOV 22, 1989

ORDER

Before: GOODWIN, Chief Judge, and SCHROEDER and BEEZER, Circuit Judges

Submission in the above case is withdrawn pending the filing of a decision in *Image Technical Services, Inc. v. Eastman Kodak Company*, No. 88-2686 (9th Cir.).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

C.A. No. 88-15293

D.C. No. CV-86-20018-RPA

DATAGATE, INC., a corporation,
Plaintiff-Appellant,

v.

HEWLETT-PACKARD CO., a corporation,
Defendant-Appellee.

FILED OCT 16, 1990

ORDER

Before: GOODWIN, Chief Judge, SCHROEDER and BEEZER, Judges

WITHIN seven (7) days from the filing of this order, the appellee is requested to file memoranda in letter form, not to exceed five (5) pages addressing, how *Image Technical v. Eastman Kodak Co.*, No. 88-2686 does or does not impact this case.

Appellant shall have seven (7) days from the date of service to file a response.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

C.A. No. 88-15293

D.C. No. CV-86-20018-RPA

DATAGATE, INC., a corporation,
Plaintiff-Appellant,

v.

HEWLETT-PACKARD CO., a corporation,
Defendant-Appellee.

FILED AUG 2, 1991

ORDER

Before: GOODWIN, SCHROEDER and BEEZER, Circuit Judges

This case is submitted for decision as of July 30, 1991.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C 86-20018 RPA

DATAGATE, INC.,

Plaintiff,

vs.

HEWLETT-PACKARD COMPANY,

Defendant.

FILED JULY 11, 1988

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION:

This matter has been under submission for several months. The Court now has had an opportunity to reexamine all prior pleadings and to consider the thorough and well-presented briefs submitted by the parties. In light of all of the evidence and argument, the Court grants defendant Hewlett-Packard Company's ("H-P") motion for summary judgment.

The demise of plaintiff Datagate, Inc.'s ("Datagate") case stems from plaintiff's inability to show standing to sue under the antitrust laws. While Datagate has presented evidence of injury to competition caused by monopolistic behavior on the part of H-P, plaintiff has not succeeded in raising a triable issue of material fact with

respect to proof of injury to itself. As detailed below, Datagate has not demonstrated that it has lost a single customer because of H-P's change in its four-hour response time service policy. For this reason, Datagate does not have standing to pursue its claims under the federal antitrust laws and summary judgment is properly entered in favor of defendant H-P.

II. PROCEDURAL BACKGROUND:

On August 31, 1987, the Court granted in part and denied in part defendant's motion for summary judgment. In the Order of August 31, 1987 ("Order I"), the Court found that there remained a triable issue of material fact with respect to the definition of the relevant market. After detailed analysis of all evidence presented by Datagate, the Court further found that plaintiff had "failed to meet its burden of establishing the requisite injury to competition." *Order I* at 7:25-26. In particular, the Court noted that the evidence showed an increase in the number of third party maintenance firms ("3PMF") and a corresponding enhancement in the number of options available to consumers. Thus, to the extent that Datagate relied upon alleged injury to existing and practicing 3PMFs (such as Datagate), summary judgment was granted in favor of H-P.

In Order I, however, the Court went on to find that even though existing 3PMFs had not been injured by H-P's policies and practices, Datagate could show injury to competition by demonstrating that H-P had chilled competition by deterring outsiders from entering the market, thereby reducing the potential options and cost savings available to consumers. *See Order I* at 9:6-11, 21-25. Thus, the lawsuit was allowed to proceed on the theory that H-P had committed acts of monopolization by deterring or preventing potential competitors from entering the 3PMF market.

Subsequently, H-P brought a motion for reconsideration. Datagate responded by filing its own motion for reconsideration. On October 23, 1987, the Court issued an order addressing these motions ("Order II"). In Order II, the Court construed H-P's motion as a motion for summary judgment on the issue of antitrust standing, *i.e.*, under the antitrust laws has Datagate demonstrated "that [its] own injury coincides with the public detriment tending to result from the alleged violation." *Orion Pictures Distribution Corporation v. Syufy Enterprises*, 829 F.2d 946, 948 (9th Cir. 1987), *quoting* II P. Arreda & H. Hovenkamp, *Antitrust Law*, § 335.1, at 229 (1986 Supp).

With regard to Datagate's motion, the Court concluded that Datagate was seeking leave to amend its complaint. The basis for the sought amendment (or "supplementation" as Datagate now argues) is that H-P altered one of its service policies on August 1, 1987. This change in policy, whereby H-P no longer would guarantee provision of maintenance service within four hours (hereafter referred to as "four-hour service") for customers other than those subscribing to H-P full service contracts, allegedly caused injury to Datagate and 3PMF competition generally. Datagate sought leave to amend its complaint for a third time to include allegations concerning H-P's new four-hour service policy.

In response to Datagate's motion, the Court ordered further briefing to address Datagate's standing as a 3PMF to challenge the alleged injury to potential outside competition, as well as the issue of H-P's August 1, 1987 change in four-hour service policy. The Court asked the parties to brief the question whether Datagate could show that H-P's new policy injured competition, and, if such an injury could be shown, whether there was good cause for permitting Datagate to file its fourth complaint two years after the initiation of the litigation. H-P's motion on antitrust standing was continued and was to be decided along with Datagate's motion.

III. DISCUSSION:

The parties filings in response to Order II make clear that Datagate's original case is properly dismissed. Datagate simply has no standing to sue on the theory of injury to potential competition. If H-P's conduct kept competitors out of the relevant market—whatever that market is—it is evident that Datagate benefitted from the exclusion. By keeping competitors out, H-P aided 3MPFs like Datagate who already were competing in the market. Datagate has not and apparently cannot show any actual injury in the form of lost sales or reduced profits. Absent such a showing, *see Hasbrouck v. Texaco*, 830 F.2d 1513, 1520 (9th Cir. 1987), *quoting Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969), Datagate is not in a position to advance the cause of unknown outsiders. Accordingly, summary judgment is granted in favor of H-P as against the Second Amended Complaint.

The more complicated question is whether Datagate's new allegations regarding H-P's new four-hour service policy are grounds for allowing the filing of an amended or supplemental complaint. If the Court were to allow the filing of a third amended complaint, the allegations would be limited to the consequences of the August 1, 1987 policy change. In other words, Datagate could not revive its previous allegations simply by the addition of these new contentions.

The parties have done a fine job in briefing the issues. Both clients' positions were ablely and articulately advanced by their respective attorneys, and the Court's task in assessing the issues presented has been greatly facilitated by the papers submitted. One issue that has become more complicated because of the papers is the question of the relevant market. Specifically, is H-P correct in suggesting that the relevant market of 3PMFs does not include "insurance brokerage" firms such as Hypoint

Technology, Inc. ("Hypoint")?[1] As in Order I, the Court finds that the issue of the relevant market raises a triable issue of material fact. Moreover, as stated by the Supreme Court, "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects". . .can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." *F.T.C. v. Indiana Federation of Dentists*, 468 U.S. 447, 460-61 (1986), *quoting* 7 P. Areeda, *Antitrust Law* § 1511, at 429 (1986). Conversely, in the absence of a showing of some detrimental effect to competition, the market share inquiry becomes moot.

(A) Has Datagate Raised A Factual Issue Whether H-P's Policy Change Caused Injury to Competition?

For purposes of H-P's motion, the Court must view all facts and inferences from fact in the light most favorable to Datagate. *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1409 (9th Cir. 1987). Viewed in such a light, the relevant market in this case would include Hypoint and all other firms providing maintenance insurance—whether or not the firms actually provide such services themselves as do Datagate and other 3PMFs. Given this assumption, Datagate has proffered sufficient evidence to raise a triable issue of material fact on the issue of injury to competition. The declarations of Leone Tiffany (showing that Insco Insur-

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[1] A discussion of the relevant market is contained in the *Declaration of Roger Costa*, General Manager of H-P's Product Support Division. See Exhibit 3 of *Declaration of James A. Meyers*, Attorney for H-P, filed on October 19, 1987. Hypoint and other "insurance brokerage" firms do not perform any service or maintenance work. Instead, the customer calls H-P directly and receives time and materials service. The customer then sends a copy of the invoice to Hypoint who in turn remits funds to the customer in the full amount of the invoice prior to the due date of the invoice. Subsequently, the consumer directly pays H-P.

ance Services, Inc. cancelled its contract with Hypoint due to H-P's change in four-hour service policy), Donald Horst (showing that Computer Applications Corporation ("CAC") cancelled its contract with Hypoint within one week of a computer breakdown which H-P exploited to force CAC to sign a contract for H-P service in order to receive four-hour maintenance service), and Duane Bluemke (asserting that U.S. Counseling Services "has lost the business" of customers requiring four-hour maintenance service as a result of H-P's change in policy) all suggest that H-P's new policy has had a detrimental effect on competition by forcing consumers to forego cheaper arrangements with insurance brokers in favor of the security of H-P maintenance service. Hence, there is a triable issue of fact concerning injury to competition.

(B) Has Datagate Raised a Factual Issue As to H-P's Intent/Motives for Its Change in Policy?

Datagate also has succeeded in raising a triable issue of material fact with regard to H-P's allegedly monopolistic motives for its change in its four-hour service policy. In the case of *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 368 (9th Cir. 1988), on which both parties rely, the Court made the following observation:

> The desire to maintain or increase one's market share is not in itself an antitrust violation, of course. . . .But a monopolist must take care that otherwise lawful acts do not have anticompetitive effects because of its monopoly power.
>
> We therefore reject Pacific Resources' broad contention that the antitrust laws may never impose duties on a monopolist to aid its competitors. Because of a monopolist's special position the antitrust laws impose what may be characterized as affirmative duties. [footnote omitted] These duties are not absolute, however; they arise only when there is no justification for refusing to aid a competitor.

> Where a monopolist's refusal to aid a competitor is based partially on a desire to restrict competition, we determine antitrust liability by asking whether there was a legitimate business justification for the monopolist's conduct. [citations omitted]

Assuming that there is injury to competition, the question presented in this motion, then, is whether H-P had a valid justification for its cessation of four-hour service to all consumers who do not have H-P service contracts. Was there a legitimate business reason supporting H-P's conduct?

H-P has put forth a strong case for a finding that its conduct was motivated, at least in part, by economic considerations. Nevertheless, the Court concludes that Datagate has raised a triable issue of fact vis-a-vis H-P's purported economic motives. Datagate's position is that H-P's explanation for its new policy is pretextual. If in fact four-hour service does comprise but one percent of H-P's maintenance service revenues, then a reasonable person might well conclude that H-P's decision to tighten its belt in that area was merely a pretext for dealing a life-threatening blow to budding competitors. The Court is not prepared to try the issue on the papers. The issue is sufficiently nuanced and factually contested to warrant denial of H-P's motion for summary judgment on this point.

(C) Has H-P's August 1, 1987 Change in Four Hour Service Policy Caused Injury to Datagate?

As a result of the foregoing conclusions, the sole remaining question is whether Datagate has suffered any injury as a result of H-P's change in its four-hour service policy. If Datagate can show injury, then it has standing and this case may go forward. However, absent a showing of injury, Datagate lacks standing and amendment of the complaint is inappropriate.

Datagate's attempt to show injury amounts to a single declaration, that of Datagate sales manager Carol Ann

Ribera. Ms. Ribera's declaration, however, is not sufficient to raise a triable issue of material fact with respect to the allegation that Datagate has been injured by H-P's August 1, 1987 policy change. This is clear when one considers six points raised by Ms. Ribera and Datagate in connection with this issue.

(1) *ASSERTION*: The Ribera declaration states that Datagate customers "often require the availability of H-P four-hour response as a contract term."

RESPONSE: The declaration of H-P attorney Robert A. Skitol completely refutes this assertion. Through discovery, H-P procured from Datagate "[e]ach contract or other written agreement to which Datagate is a party for the service, maintenance, or repair of H-P or non-H-P equipment."[2] A review of all documents produced evinced the fact that no Datagate contracts require "availability of H-P four-hour response," nor does any contract contain any provision referring to H-P service for H-P computers.

Furthermore, as pointed out by Mr. Skitol, at least two of Datagate's contracts contain language forbidding the delegation of work to third parties. Those two contracts are attached as part of Exhibit 4 to the Declaration of James Meyers, submitted November 6, 1987. The contract language states that "[n]either party shall have the right to assign this Agreement or delegate performance of any of its obligations under this Agreement to a third party except to one or more of its subsidiaries or affiliates." Hence, by the terms of its own contracts, Datagate has no right to delegate work to H-P and Datagate customers appear to have no contractual authority to demand such a delegation.

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[2] The Court notes that this document request not only covers any contracts entered into by Datagate as a 3PMF, but also contracts wherein Datagate may act as a broker to provide maintenance insurance.

(2) *ASSERTION*: The Ribera declaration states that H-P's four hour service is an indispensable safety net to Datagate. "In order to obtain new service contracts, Datagate must often agree to those terms [i.e., H-P back-up service must be available] until the consumer has gained confidence in Datagate's service abilities."

RESPONSE: Datagate offers no specific examples in support of this assertion. This argument is clearly belied by the fact that no Datagate contracts contain any provision requiring the availability of H-P support services in the event Datagate fails. The contracts do contain a guarantee that Datagate will provide service in four hours. Thus, it appears that customers legally have manifested their faith in Datagate's service without the need to contract for H-P coverage; this fact speaks well of the quality of Datagate's services, but demolishes Datagate's assertion on this point.

(3) *ASSERTION*: In the first sentence of paragraph four of the Ribera declaration, Ms. Ribera indicates that in addition to being a 3PMF, Datagate acts as an insurance broker like Hypoint. In the next sentence, Ribera states that "[t]here is particular HP equipment that Datagate does not have the resources to service without the four-hour response service." This equipment allegedly includes H-P 3000 (6X) and (7X) mainframe computers. The elimination of H-P four-hour response service for these computers allegedly would make it "impossible for Datagate to compete against HP for service contracts."

RESPONSE: To the Court's knowledge, this is the first time that Datagate has described itself as an insurance broker like Hypoint. Nowhere in the Second Amended Complaint does Datagate describe itself as an insurer, nor does it describe any activities consistent with those of broker insurers such as Hypoint. To the contrary, in the complaint and throughout this litigation, Datagate has held itself out as a 3PMF. One flat, unsubstantiated assertion

in a declaration is not enough for Datagate now to claim a new role vis-a-vis its allegations against H-P. Without further support and some explanation, the Court cannot accept Datagate's self-characterization as an insurance broker like Hypoint.

The second part of paragraph four of the Ribera declaration is less puzzling. If in fact Datagate services H-P 3000 computers and is forced out of that line of work because of H-P's new policy, then Datagate will have sustained injury. The problem is that Datagate has offered no specifics to support this assertion or to show loss of any customer(s). Datagate has not produced a contract containing reference to such a computer, nor has Datagate shown that it lost a contract covering such computers because of H-P's new policy. Without such evidence, indeed without any evidence at all, going to show injury, Datagate has not raised a triable issue of material fact regarding standing.

(4) *ASSERTION*: Several Datagate customers have expressed concern to Datagate about H-P's new policy.

RESPONSE: Words expressing cancellation of Datagate contracts—rather than expressions of concern—are useful to show injury. Once again, Datagate has failed to demonstrate the loss of a single customer due to H-P's new four-hour service policy.

(5) *ASSERTION*: Datagate through Ribera contends that it has lost good will because H-P has informed Datagate customers that H-P "could put Datagate out of business within six months."

RESPONSE: The fact that Datagate is still alive and doing well in business more than six months after the alleged statements itself goes to undermine H-P credibility and bolsters the credibility of Datagate. It appears that Datagate is proving that it can provide its services equally effectively as H-P. This behavior, and not a legal assault

under the antitrust laws, is the most effective response to loose talk of the variety allegedly engaged in by H-P. In any event, Datagate has not demonstrated a loss of good will.

(6) *ASSERTION*: In its final brief at footnote one to page three, Datagate states that "the issue before the Court is not the continued existence of Datagate," but injury to competition. Datagate alleges that the injury is that no 3PMF can provide four hour service to H-P computer users. Datagate then asserts: "At the very least, an issue of fact as to the effect on Datagate emerges."

RESPONSE: This is the bootstrap method of attempting to show antitrust standing. Datagate is correct that injury to competition is the prime issue before the Court. However, for purposes of determining Datagate's right to prosecute this lawsuit, the important issue is whether Datagate itself has been injured. Consequently, the continued existence and well being of Datagate is before the Court. A plaintiff cannot bear its burden on this point merely by pointing to injury to competition—as Datagate attempts to do in the above passage. Certainly, injury to competition by the cessation of four-hour service on a time and materials basis to H-P computer users may have an effect upon Datagate. The point is that Datagate must demonstrate that there is such an effect in order to establish the existence of a triable issue of material fact. Without some proof on this issue, Datagate will have failed to show antitrust standing.

In this instance, Datagate has failed to offer any proof that the August 1, 1987 policy change by H-P cause it injury. Consequently, Datagate does not have standing to prosecute this lawsuit. The Court has reached this conclusion after careful review of all the evidence presented by Datagate. Plaintiff's allegations are serious and appear to set forth an important claim against H-P. Nevertheless, at no point in this litigation has Datagate come forward

to show how it has been injured. Perhaps Datagate is a victim of its own success and ability to adapt insofar as it cannot show injury. Its own success may be the one reason precluding it from representing other 3PMFs who have been injured. Whatever the explanation, the fact is that Datagate has not demonstrated injury. Without such a showing Datagate has no standing to prosecute this lawsuit. The mantle falls to other 3PMFs and broker/insurers such as Hypoint to combat H-P's allegedly monopolistic and predator practices. This chapter of that litigation struggle has come to a close.

IV. CONCLUSION.

As explained above, Datagate has defeated the motion for summary judgment on the issues of injury to competition and the existence of a legitimate business motive for H-P anti-competitive policy change. However, Datagate has not raised an issue of material fact with regard to any injury it may have suffered as a result of H-P's change of four-hour service policy which took effect on August 1, 1987. Good cause appearing therefor, defendants' motion for summary judgment is hereby granted.

IT IS SO ORDERED.

DATED: July 11, 1988

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NO. C-86-20018-RPA

DATAGATE, INC.,

Plaintiff,

vs.

HEWLETT-PACKARD COMPANY, a Corporation,

Defendant.

FILED NOV 7, 1986

[~~PROPOSED~~] ORDER GRANTING STIPULATED MOTION TO DISMISS AND TO STRIKE

By an order filed September 22, 1986, this Court dismissed the First Amended Complaint of Datagate, Inc. in this matter, granting leave to amend each of the dismissed claims. Among these was plaintiff's third count, alleging an illegal tie-in scheme.

Datagate has now filed its Second Amended Complaint. "Count Three" alleging the tie-in is replead verbatim. Count Four for injunctive relief, is also repeated verbatim insofar as it is based on a tie-in offense. (Datagate deems this as having been necessary in order to preserve its right to appeal the Court's dismissal of the tie-in claim.) Accordingly, the parties stipulate that it is now appropriate for this Court to dismiss the tie-in claim—paragraphs 50-56—and the claim for injunctive relief insofar as that claim

is based upon a tie-in offense (paragraphs 60 and 61) with prejudice. The Court finding good cause therefor, it is hereby

ORDERED, that:

1. Count Three of the Second Amended Complaint, alleging an illegal tie-in scheme, at paragraphs 50-56 inclusive, is dismissed with prejudice.

2. Count Four insofar as it seeks relief with respect to the alleged tie-in claim, is also dismissed with prejudice.

3. The following portions of the Second Amended Complaint are hereby stricken:

a. The reference in the caption of the Second Amended Complaint to "Illegal Tie-In (15 U.S.C. section 1-2)";

b. Paragraphs 60 and 61 of the Second Amended Complaint;

c. Paragraphs 2 and 5 of the Prayer;

d. All incorporations by reference of the dismissed Third and Fourth Counts or the paragraphs stricken above.

Defendant shall have ten days from the date of this order in which to file its responsive pleading to the remainder of the Second Amended Complaint.

IT IS SO ORDERED.

DATED: November 7, 1986

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-86-20018-RPA

DATAGATE, INC., a corporation,
Plaintiff,

vs.

HEWLETT-PACKARD COMPANY, a corporation,
Defendant.

FILED SEPT 22, 1986

ORDER DISMISSING FIRST AMENDED COMPLAINT

The Court has received, read and considered the papers and pleadings submitted on the Defendant's Motion to Dismiss the First Amended Complaint. Good cause appearing therefor, the Court hereby finds and orders the following.

The first amended complaint alleges eight claims, and the Court will address each of the claims separately as follows.

Claims one and two for monopolization and attempted monopolization.

The plaintiff asserts both these claims for violation of 15 U.S.C. § 2. The Court has previously found that the plaintiff must allege an injury to competition in order to maintain claims for for monopolization and attempted monopolization. *See* Order Dismissing Complaint, June 10, 1986. Accordingly, the plaintiff must plead an adverse ef-

fect on various factors of competition in order to maintain these claims.

Plaintiff has partially met the terms of this Court's previous Order by pleading more than mere economic harm to the plaintiff. Plaintiff has not, however, adequately pled the injury to competition that is the heart of these claims.

Accordingly, the Court hereby GRANTS the defendant's motion to dismiss these claims.

Claim three for illegal tie-in.

Plaintiffs may state a claim for illegal tie-in, 15 U.S.C. §§ 1-2, based upon either a *per se* or a rule of reason theory of liability. Under the *per se* theory, the plaintiff must allege that the seller of the tying product coerced the purchaser into buying the tied product. In order to make this showing, the plaintiff must plead either that an appreciable number of buyers have accepted burdensome terms or it must allege facts sufficient to permit this Court to infer that the plaintiff has sufficiently pled the existence of coercion in the tie-in claim.

The plaintiff has not sufficiently alleged the element of coercion in this first amended complaint. Therefore, the Court hereby DISMISSES the claim to the extent that it is founded upon a *per se* theory of liability.

Alternatively, the plaintiff may state a claim under a rule of reason theory. Under this theory, the plaintiff must plead an injury to competition. As detailed above, the plaintiff has not sufficiently pled an injury to competition. Accordingly, the Court hereby DISMISSES this claim to the extent that it is based upon a rule of reason theory of liability.

Therefore, the plaintiff has not pled a claim for illegal tie-in under either theory, and the Court hereby DISMISSES the claim.

Claim four for injunctive relief.

Plaintiff seeks relief under 15 U.S.C. § 26. That statute empowers the Court to provide injunctive relief "against threatened loss or damage by a violation of the antitrust laws." The plaintiff has not yet sufficiently pled a violation of the antitrust laws. Accordingly, the Court hereby DISMISSES this claim.

Pendent state claims five through eight.

Having dismissed the above federal claims, the Court hereby DISMISSES the pendent state claims as well.

Leave to amend.

The Court GRANTS the plaintiff leave to amend each of the above claims. Plaintiff may file a second amended complaint in order to comply with this Order and the requirements of law. Any amended complaint must be filed within thirty (30) days of the date of this Order.

Further status conference.

Parties shall appear before this Court for a further status conference in this matter at 10:30 a.m. on January 23, 1987.

IT IS SO ORDERED.

DATED: September 22, 1986

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-86-20018-RPA

DATAGATE, INC.,

Plaintiff,

vs.

HEWLETT-PACKARD COMPANY,

Defendant.

FILED AUG 31, 1987

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This Court has received, read and considered the papers and pleadings submitted on the defendant's motion for summary judgment in this action, and the Court has heard and considered the oral argument of counsel. Good cause appearing therefor, the Court hereby finds and orders the following.

The plaintiff asserts that the defendant, HP, engaged in certain allegedly anticompetitive practices regarding the service and repair of certain HP hardware products. The plaintiff is a third party maintenance firm ("3PMF") that supplies maintenance and repair services to consumers of HP hardware products. In its Second Amended Complaint ("Complaint"), the plaintiff asserts the following claims:

1) Monopolization (15 U.S.C. § 2);

2) Attempt to monopolize (15 U.S.C. § 2);

3) Illegal tie in [withdrawn by Stipulation and Order pursuant to this Court's previous Order dismissing complaint.];

4) Injunctive relief (15 U.S C. § 26) [illegal tie-in allegations withdrawn from this claim also];

5) Interference with prospective business advantage;

6) Unfair competition (Cal. B&P §§ 17200, 17500; Cal. Civil Code § 3369);

7) Disparagement; and

8) Defamation.

Claims four through eight are based entirely on state law. The defendant seeks summary judgment on the three remaining federal claims, and then dismissal of the state claims for lack of a federal question.

DISCUSSION OF THE LAW

The defendant seeks summary judgment on the federal Sherman Act claims based on two separate theories. First, the defendant argues that there has been no injury to competition. Second, it argues that the plaintiff cannot define a market by limiting it to servicing a single manufacturer's computers.

The Court must start with certain basic truths about the nature of and standard for summary judgments. The Court must view all facts and draw all inferences in the light most favorable to the party opposing the motion. *See United States v. Diebold, Inc.* 369 U.S. 654, 655 (1962). It is also well established that summary judgment is not appropriate where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986).

At the same time, the Court must remember that the purpose of summary judgment is to "pierce the pleadings

and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Electric Industrial Co. Ltd., v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986); quoting Advisory Committee Note to 1963 Amendment to Fed.Rule Civ Proc. 56(e) 28 U.S.C. App., p 626. Once the moving party properly asserts the motion, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." Fed.Rule Civ. Proc. 56(e). Furthermore, summary judgment properly lies "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986).

Summary judgment is disfavored in complex antitrust litigation if extensive factual determinations must be made concerning intent and motive. *Betaseed Inc. v U&I Inc.*, 681 F.2d 1203, 1207 (9th Cir. 1982). However, it is appropriate "in the absence of any significant probative evidence tending to support the complaint." *Barry v. Blue Cross of California*, 805 F.2d 866, 871 (9th Cir. 1985) (quoting *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680 (9th Cir 1985)); *Betaseed* 681 F.2d at 1207. Then it can be applied "in the twinkling of an eye." *Barry*, 805 F.2d at 871 (quoting *NCAA v. Board of Regents* 468 U.S. 85, 109-10 n.39 (1984).

Application to the issues presented here

Turning to the issues presented here, the Court notes that the parties contest the existence of two elements, each of which is necessary to the maintenance of an antitrust claim The parties contest both the definition of the relevant market and the existence of an injury to competition.

Definition of the relevant market

Datagate states that "[i]n order to determine the relevant market, it is vital to understand the product at issue

in this case. That product is the service and repair of HP hardware systems, and more specifically service and repair of HP minicomputer systems." Plaintiff's memorandum in opposition to the motion for summary judgment at 13:14-17. Hewlett Packard vigorously contests Datagate's definition of the relevant market.

Analysis of the relevant market can be quite extensive. In this case, it involves significant questions of both law and fact concerning the existence of a market limited to servicing the products of a single manufacturer.

On the basis of the documents currently on file in this matter, the Court cannot find that the parties present no genuine issue of material fact concerning the definition of the relevant market. The definition of the relevant market will depend on the resolution of certain factual issues that are now in dispute. Accordingly, and with good cause appearing therefor, the Court hereby DENIES the defendant's motion for summary judgment on the issue of the definition of the relevant market.

Based on the above ruling the Court's analysis will focus on the existence of an injury to competition under any definition of the relevant market.

The existence of an injury to competition

This Court twice required the plaintiff to allege in its complaint that the defendant's acts caused an injury to competition. *See* Orders of June 10, 1986, and September 22, 1986. The antitrust laws exist to protect competition and not individual competitors. In other words " 'it is injury to the market not to individual firms, that is significant.' " *Ralph C. Wilson Industries, Inc. v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1363 (9th Cir. 1986) (quoting *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1292 (9th Cir.), *cert. denied*, 464 U.S. 822 (1983)).

Injury to the market is demonstrated by detriment to consumers in the market in terms of price, quality and availability of the product at issue. *Aspen Skiing Co. v. Aspen Highland Skiing*, 472 U.S. 585, 105 S.Ct. 2857, 2859 (1985); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1484 (9th Cir. 1986).

Both Datagate's Second Amended Complaint and its opposition to this motion are premised upon the assertion that there has been a reduction in the supply of service providers in the relevant market. Datagate argues that "Consumers of service for HP hardware service have been and are being harmed because the supply of service providers has been and is being reduced, and because the price for service consequently has been and is being raised." Second Amended Complaint, ¶ 46.

The plaintiff asserts that 3PMFs help serve consumers in the relevant market, and it asserts that a reduction in the quantity of 3PMFs will affect competition in the relevant market. The plaintiff supplies expert evidence that HP service prices are higher than IBM's or DEC's for a comparable product, and it also argues that HP's profits are too high but it supplies no specific comparative profit figure. The lynchpin of the plaintiff's argument is clearly that the supply of service providers has indeed been reduced.

The defendant presents evidence that the number of firms that provide service to HP hardware has increased during the relevant time period and that HP users have more service options available to them than three years ago. HP does not categorize those firms that service the minicomputer and the complex peripherals separately from all other service providers. The plaintiff argues that the relevant market is the minicomputer and complex peripherals market and that competition in that market has declined. Due to the procedural posture of this action, this Court has also assumed the market to be as defined by

the plaintiff, but the Court cannot accept mere argument that competition has been injured in that market. Because the plaintiff must bear the burden of proof on this issue at trial, the plaintiff must supply the Court with facts that indicate the requisite injury to competition. The Complaint alleges that certain HP practices have caused other competitors to lose certain contracts. *See* Complaint at ¶¶ 42-46. The Court has carefully evaluated all the pleadings and papers submitted for evidence of some injury to competition in the relevant market. The Court cannot infer injury to competition solely from certain competitors' loss of customers. This is particularly true where the defendant supplies evidence that certain accounts lost by the specified competitors went to other non-HP competitors in the market.

With one exception, the plaintiff does not supply any evidence that the lost accounts or any HP practice drove specific competitors out of business. That exception, Sierra Computers, lost its sole customer, the China Lake Naval Weapons Center. That customer, however, gave its business to the McLaughlin Research Corporation, a 3PMF which newly entered the market. This cannot establish any injury to competition. Even if the Court assumes that Sierra's injury was due to HP's actions, injury to a single competitor will not suffice to establish an anticompetitive effect. *See Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983).

The Court finds that the plaintiff has failed to meet its burden of establishing the requisite injury to competition. The defendant supplied evidence that the number of 3PMFs servicing the market has increased and that the consumer has more options available to him now than before the allegedly anticompetitive acts occurred. The plaintiff bears the evidentiary burden at trial, and it has failed to meet that burden here.

Accordingly, the Court hereby GRANTS the defendant's motion for summary judgment to the extent that it relies on the plaintiff's allegations that HP's practices have harmed competition by injuring specific, already existing and practicing 3PMFs.

Alternative allegations of a chilling effect

The plaintiff alternatively argues that HP's allegedly anti-competitive conduct has prevented potential competitors from entering the relevant market. According to this theory, the plaintiff asserts that the defendant has harmed competition by chilling new entrants into the market. The Court found that the parties had not sufficiently briefed this issue in their initial papers, and the Court requested supplemental briefing on this issue.

The Court must determine whether a chilling effect on new entrants can constitute a cognizable injury to competition. This raises an interesting issue which exists largely because of the benefits derived by the rapid increase in technology in the computer field. In essence, the plaintiff argues that, even if the consumer has benefitted during the relevant time period, that benefit has been reduced by the anticompetitive conduct of the defendant. The typical Sherman Act case addresses an alleged decrease in competition which causes a decrease in existing benefits to the consumer. In this case, the plaintiff asserts the existence of a decrease in the rate of increase of benefit to consumers.

The Court finds that the existence of a chilling effect may constitute an injury to competition in a particular case. However, in order to state such a claim, the plaintiff must demonstrate the existence of a chilling effect, its detrimental effect on competition which harms consumers, and that HP caused the chilling effect. In its Order Requiring Supplemental Briefing On Certain Issues, the Court stated:

> Specifically, the Court seeks briefing on the issue of whether a "chilling effect" on potential entrants to the market can constitute a cognizable injury to competition. The parties must also address the issue of what showing must be made in order to sustain a claim based on the chilling effect. Finally, the parties must specify what facts currently exist in the record to support a finding of an injury to competition based entirely on a chilling effect to potential new entrants to the market.

Id. at 2:3-10.

In the second stage of its inquiry, the Court must determine what showing the plaintiff must make to sustain a claim based on a chilling effect. It is clear that the plaintiff must show that the defendant's conduct actually caused potential entrants to refrain from competing in the relevant market. The plaintiff must also demonstrate that the alleged chilling effect harmed competition and injured consumers.

Thirdly, the Court must look to the record to determine what showing the plaintiff has made in this case. In this regard, the Court notes that the plaintiff did not comply with the Court's Order by specifically referring to the record to support a finding of injury to competition.

The plaintiff's showing of injury depends in large part on the declaration of Donald F. Blumberg. HP argues that the Court should disregard Blumberg's declaration on the ground that it fails to comply with Fed. R. Civ. P. 56(e). Rule 56(e) requires that all affidavits submitted in motions for summary judgment shall be made on personal knowledge and shall set forth facts that would be admissible as evidence. HP argues that Blumberg's declaration would not be admissible.

The Court has reviewed Blumberg's declaration in order to determine its admissibility. The Court will consider

Blumberg's declaration in ruling on this motion for summary judgment. By considering the evidence at this stage, the Court is not finding that the study, its results, or Blumberg's interpretation of its results, will be automatically admissible at trial. Instead, the Court finds that Blumberg's declaration sufficiently complies with Rule 56 to warrant consideration in the instant motion for summary judgment. The Court will consider separately any objections properly asserted at trial in this matter.

Blumberg states that HP's "ISO Policy" has chilled potential entrants because they believe that would be unable to obtain the parts and training necessary to service H-P systems. Blumberg states that H-P maintains 95% or greater market share in the relevant market and that the market revenues for the maintenance of all H-P hardware is over $600 million in 1986. Blumberg also states that service for H-P systems is more expensive than service for other comparable systems and that service on H-P systems is of lower quality than is the service on comparable systems. Thus Blumberg concludes that competition is harmed and that consumers are injured by H-P's alleged anticompetitive acts.

The plaintiff also supplied a declaration from Richard J. Gilbert. The Gilbert declaration also asserts or implies that H-P's conduct has chilled potential entrants in the relevant market and that both competition and consumers have been injured by that chilling effect.

The Court must view the evidence in the light most favorable to Datagate for the purposes of this motion. Viewing the evidence in that light, the Court finds that Datagate has raised sufficient issues of triable fact to compel this Court to deny H-P's motion for summary judgment as to the issue of a chilling effect. The Court cannot say that no reasonable jury could find for the plaintiff on the basis of the current record in this matter. Accordingly, the Court hereby DENIES H-P's motion for summary

judgment to the extent that it is predicated on the lack of a chilling effect on potential entrants to the relevant market.

Accordingly, and with good cause appearing therefor, the Court hereby GRANTS in part and DENIES in part the defendant's motion for summary judgment.

Pendent state law claims

Claims four through eight of the Complaint assert various violations of state law. The defendant sought dismissal of the pendent state law claims in this matter. This Court has denied summary judgment as to certain federal claims before the Court. Consequently, the Court will retain jurisdiction over those federal claims. Therefore, the Court will continue to exercise jurisdiction over the pendent state law claims in this matter, and the Court hereby DENIES the motion to dismiss claims four through eight as they are enumerated in the Second Amended Complaint.

IT IS SO ORDERED.

Dated: August 31, 1987.

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C 86-20018 RPA

DATAGATE, INC.,

Plaintiff,

v.

HEWLETT-PACKARD COMPANY,

Defendant.

FILED OCT 23 1987

ORDER CONTINUING MOTION AND ORDERING ADDITIONAL BRIEFING ON NEW EVIDENCE

I. INTRODUCTION:

The Court has received, read, and considered all papers submitted on the parties' motions for reconsideration. The matter has been deemed submitted without oral argument. Good cause appearing therefor, the Court finds and orders as follows:

II. THE POSTURE OF THE CASE:

On August 31, 1987, the Court issued an "Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment" (hereafter, the "Order"). There were two general issues raised by defendant in its motion. The first was the relevant market. The second was injury to competition. As to the issue of the relevant market, the Court ruled that there remains a triable issue of material

fact with respect to the identification of the proper market in this case. Regarding injury to competition, the Court concluded that plaintiff Datagate, Inc. ("Datagate") had failed to show that defendant Hewlett-Packard Company's ("H-P") practices "have harmed competition by injuring specific, already existing and practicing 3PMFs [i.e., third-party maintenance firms]." *Order* at 8. To the extent that Datagate sought to show injury to competition on that basis, summary judgment was granted against Datagate. This was not the termination of Datagate's case, however, for the Court found that Datagate had introduced sufficient declaration testimony to raise a triable issue as to whether H-P's conduct had injured competition insofar as that conduct chilled potential competition by inducing potential market entrants to refrain from entering the market.

After receiving the Court's Order, H-P brought this motion for reconsideration. The basis of H-P's motion is that Datagate does not have standing to litigate this case on behalf of the potential market entrants. Contrary to plaintiff's strident call for Rule 11 sanctions, the crux of H-P's motion is well taken. The only mistake made by H-P, if one could call it that, is to have dubbed this a motion for reconsideration. In fact, H-P is raising an issue not addressed in the Court's Order—antitrust standing—and the reason it was not addressed in the Order was because it was not raised in H-P's motion. In light of the Court's Order, however, antitrust standing properly has become the focus of dispute. Thus, although H-P has called this a motion for reconsideration, the Court views it as a motion for summary judgment on the issue of antitrust standing. Specifically, two issues are raised: (1) has Datagate suffered injury; and (2) even if Datagate has suffered injury, does plaintiff have standing under the antitrust laws to pursue its claims?

In addition to opposing defendant's motion, Datagate has brought its own motion for reconsideration. Datagate's

motion is accurately denominated to the extent that plaintiff wishes a second chance to show that H-P has caused injury to firms presently competing in the relevant market. Like its opponent, however, Datagate slightly abuses judicial nomenclature when referring to this as a "counter motion" for reconsideration. In fact, the key aspect of the motion, if granted, would entail amendment of the Complaint. Such an amendment is properly described as a motion to amend the complaint under Rule 15 of the Fed. R. Civ. P..

In support of this motion, Datagate has filed multiple declarations, including submissions made in a federal court proceeding in Ohio. The Court will address the "counter motion" before turning to defendant's motion regarding antitrust standing.

III. DISCUSSION:

A. Datagate's Motion for Reconsideration:

The bases for Datagate's motion for reconsideration are five pieces of "new evidence." As will be seen, some of the evidence is new, but for the most part the evidence is the rehashing of prior allegations.

(i). Declarations of Blumberg, Gilbert, and O'Connor:

The declarations of Mssrs. Blumberg, Gilbert and O'Connor do not raise new evidence but instead repeat old allegations in a different form. Allegations of injury to Datagate and to competition generally are simply not enough. H-P is correct in assessing these declarations as expressions of plaintiff's "disgruntlement at not having as many service contracts as it believes it should." *Reply Brief* at 14.

(ii). Deposition Testimony of Buckner:

The parties each offer their favorite portions of the deposition testimony of Robert Buckner, an employee of

unspecified capacity with Rockwell International ("Rockwell"). Rockwell is a consumer for maintenance services of the sort supplied by H-P, Datagate, and other 3PMFs. Although Datagate omits reference to crucial pages, the gist of plaintiff's contention is that H-P told Rockwell that H-P software maintenance (H-P software is proprietary) was tied to H-P hardware maintenance. Rockwell allegedly renewed its contract with H-P in May 1986 because of H-P's threats.

H-P counters this testimony with several points. First, it appears that Mr. Buckner alone at Rockwell was privy to this threat. He never informed his superiors or sought legal advice. Second, although Buckner did tell Datagate about the threat, Datagate apparently had no immediate interest in Rockwell since it never submitted a bid for the May 1986 contract. Third, any fear that Rockwell experienced in the person of Buckner was quickly overcome in the fall of 1986 when Rockwell dumped H-P maintenance service in favor of a 3PMF operating locally.

Viewing the total picture, the Court finds that Buckner's declaration is too insignificant to raise a triable issue of material fact. Snatches of deposition testimony (for example, the crucial discussion between Buckner and H-P appears in snippets on pages 43, 47, 50, 53 and 59—Datagate omits the surrounding pages) are insufficient at this point to raise triable issues. One person's undocumented understanding is not enough to show coercion in this context. Datagate has offered no evidence showing that H-P actually had a policy of tying hardware maintenance to software maintenance. Furthermore, Datagate already has stipulated to withdraw its illegal tie-in allegation. Therefore, the Court concludes that Buckner's "new evidence" is insufficient as a matter of law to raise a triable issue of material fact.

(iii). Five Declarations Filed in Ohio Federal Case

Datagate believes that five declarations filed in a case in the United States District Court for the Northern District of Ohio "show extensive and threatened harm to existing 3PMFs all over the country" (hereafter the "Ohio declarations"). All five of the Ohio declarations focus on a particular action taken by H-P alleged to have severe anticompetitive effects on the market. Specifically, on August 1, 1987, H-P announced to 3PMFs that H-P was discontinuing four-hour or same-day response time for the service of H-P computers. More importantly, H-P informed users of H-P computers that such service would no longer be available to any customer not under a H-P service contract. As the declarations and letters of H-P customers attest, the effect of this policy change was to force many users of H-P computers to terminate or abstain from contracts with 3PMFs. This is because many customers require immediate or almost immediate service during computer breakdowns.

Defendant correctly points out that Datagate made no mention in its Second Amended Complaint (the "Complaint") of this aspect of H-P's service business. In essence, reference to this policy change is an attempt to raise issues of material fact by going outside the Complaint. Literally speaking, defendant is correct in asserting that this evidence is irrelevant to the allegations in the Complaint. The question, then, is how to deal with the introduction of this new evidence. Rather than allowing the filing of a third amended complaint (which is the essence of Datagate's request), the Court hereby orders briefing on the issue of injury to competition raised by the Ohio declarations.

The Court hereby continues the motion on antitrust standing (defendant's motion for reconsideration). The parties are to file briefs addressing the August 1, 1987 H-P policy change as a possible basis for showing injury to competition. The Court also welcomes argument on

whether there is good cause for the filing of an amended complaint at this late stage in the litigation. Parties are to file briefs in support of their respective positions by November 6, 1987. Opposition briefs are to be filed by November 13, 1987. The matter will be deemed submitted without oral argument of November 20, 1987. Depending on the resolution of that issue, the Court will either set a hearing date for the antitrust standing issue or deem the standing issue submitted and issue a ruling without oral argument.

The Court hereby vacates the pretrial and trial dates in this case. New dates will be set subsequent to the resolution of the issues before the Court.

IV. CONCLUSION:

Good cause appearing therefor, the Court has continued defendant's motion for reconsideration and requested further briefing on one aspect of plaintiff's counter motion for reconsideration. Upon the receipt of all briefing on that motion, the matter will be deemed submitted without oral argument. Depending on the outcome of plaintiff's motion, the Court will either set a new hearing date on defendant's motion or deem the matter submitted on the papers. At that time, the Court will determine whether new pretrial and trial dates are necessary.

IT IS SO ORDERED.

DATED: October 23, 1987

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Court

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-86-20018 RPA

DATAGATE, INC.,

Plaintiff,

vs.

HEWLETT-PACKARD COMPANY,

Defendant.

FILED JUNE 10, 1986

ORDER DISMISSING COMPLAINT

Defendant moves to dismiss Counts I and II of the complaint for failing to state a claim upon which relief can be granted. Having reviewed the complaint, considered the briefs and the argument of counsel, and good cause appearing therefor, the Court orders as follows.

The complaint does not allege, and states no facts that would support an allegation, that defendant has yet implemented its December 6, 1985, ISO policy in such a way as to restrict plaintiff's access to products or services. The new ISO policy merely announces a potentiality that defendant has yet to effectuate. Plaintiff's Sherman Act claims cannot rest on such prospective and speculative injury, and to the extent that they do, they are dismissed with prejudice.

However, plaintiff further alleges that defendant has deliberately used its new ISO policy as a sales tool to

scare away customers from its competitors. Defendant does not adequately address why such a deliberate use of its policy as a sales tool to impair competition could not constitute a violation of the Sherman Act.

To state such a claim, plaintiff would have to allege that defendant has 1) adopted a potentially anticompetitive policy, 2) utilizes the policy as a sales tool with the intent to scare customers away from competitors, 3) succeeded or is likely to succeed in scaring them away, and 4) will thereby impair competition in the service/maintenance market for defendant's products beyond mere economic harm to plaintiff. As now drafted, the complaint adequately alleges the first two elements, but not the second two.

Therefore, the Sherman Act claims are dismissed, with 20 days leave to amend. Plaintiff also has leave to amend to describe the relevant geographic market.

The pendent claims are also dismissed, but may be repleaded with the Sherman Act claims. Plaintiff's motion for sanctions is DENIED.

IT IS SO ORDERED.

DATED: June 10, 1986

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 86-20018 RPA

DATAGATE, INC.,

Plaintiff,

vs.

HEWLETT-PACKARD COMPANY,

Defendant.

FILED AUG 11, 1988

ORDER DENYING MOTION FOR DISQUALIFICATION

I. INTRODUCTION.

Defendant Datagate, Inc. ("Datagate") has brought this motion seeking my disqualification pursuant to 28 U.S.C. § 455 on the sole ground that the employment of my son, Robert Anthony Aguilar, by plaintiff Hewlett-Packard ("HP") would cause a reasonable person to question my impartiality, 28 U.S.C. § 455(a). As explained below, the motion is denied.

II. FACTUAL BACKGROUND.

I have or recently have had on my docket at least four cases involving HP, a company with its headquarters in this venue. I am aware that there are at least four cases involving HP because counsel for HP has provided carbon copies to me of disclosure letters it sent to opposing counsel

in four cases on my docket. I am also aware of the fact that my son, Robert Anthony Aguilar, has been employed by HP for over a decade. HP informs me in its papers that Robert has been employed by it for a period of fifteen years and I have no reason to doubt that figure.

HP first learned of the connection between my son and me in June 1988 at an HP conference in Lake Tahoe, California. Subsequent to a presentation in which the speaker mentioned one or more cases involving HP on my docket, an HP employee attending the conference reported from the audience to the speaker that my son works for HP in its Corvallis, Oregon facility. HP investigated this statement and learned that of the ten individual [sic] employed by HP with the surname "Aguilar," one of them is my son Robert Anthony Aguilar. HP employs 83,000 employees.

After conducting an investigation and satisfying itself that disqualification was not required, HP contacted opposing counsel by letter informing them of the connection between me, my son Robert Anthony Aguilar, and HP. After receiving the letter, reading journalistic accounts of the facts of the situation, and learning of my decision not to disqualify myself on a different HP case, Datagate filed this motion for disqualification.

III. DISCUSSION.

Datagate sets forth a single legal ground for my disqualification, stemming from 28 U.S.C. § 455. Datagate seeks disqualification because pursuant to § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." As noted in Datagate's papers, the background of the provision suggests that Congress intended to replace the former subjective standard with an objective standard whereby the judge is to consider whether a reasonable person, "knowing all the circumstances, would believe that the judge's impartiality could be questioned." 13A Wright, Miller and

Cooper, *Federal Practice and Procedure* § 3549, at 612 (West 1984). Thus, although Congress intended that the judge himself make the decision whether disqualification is proper without soliciting the views of the parties, the standard to be applied is that of the "reasonable person." In making this determination, the Supreme Court has stated that "it is critically important . . . to identify the facts that might reasonably cause an objective observer to question [the judge's] impartiality." *Liljeberg v. Health Services Acquisition Corp.*, ___ U.S. ___, 56 U.S.L.W. 4637, 4642 (June 17, 1988).

Datagate points to a single fact which it believes counsels disqualification, namely, that my son, Robert A. Aguilar was employed by HP before, during, and after the time of this litigation.

My son Robert Anthony has been employed by HP for a period of time of nearly twice the length of that which I have enjoyed as a federal judge. The mere fact of continuous employment means nothing in itself. My son and I have never discussed my HP cases or any other cases for that matter, except for occasional banter about results or facts of my cases that are in the news and generate public interest. We have never discussed the content or status of a pending case. In short, there is nothing in the fact that my son is employed by HP that would raise reasonable doubts about my impartiality.

Unlike Bausch & Lomb, Inc. which filed a similar motion in another HP case on my docket, Datagate does not attempt to argue any connection between my son's employment and this case. Nevertheless, I must point out that Datagate has not even suggested any connection between the subject matter of this case and the division of HP where my son is employed. The HP division for which he works in Corvallis, Oregon produces HP calculators, not the large computers that are the subject of this suit. There is no reason to believe that the security of my son's future

employment would be negatively impacted by a decision adverse to HP. I understand that my son is a supervisor and has a significant job, but he is not part of management, nor does he have any role in policy making. It is simply not plausible to conclude that my decision in a case involving the maintenance of mainframe HP computers, a product totally unrelated to the product made in Corvallis, Oregon would in any way be influenced or compromised by the fact that my son is a shipping supervisor in an HP plant in another state making a different product. Considering the size of HP and the magnitude of its sales, an adverse decision in one of its product lines is not likely to have such a significant impact that a reasonable person would doubt my impartiality merely because one of HP's 83,000 employees is my son.

Although Datagate does not discuss the issue, it should be pointed out that my son Robert Anthony does not own HP stock and to my knowledge, and to the extent that the contrary has not been shown on the record, never has owned stock during the time of these proceedings. I learned for the first time in connection with this motion that my son is part of HP's profit sharing plan. The declaration of William H. MacAllister, Assistant General Counsel for HP,[1] states that all HP employees are automatically enrolled in a cash profit sharing program following six continuous months of employment. Payments are made twice annually in cash and no company stock is issued. Hence,

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[1] References to declarations in this order related to those submitted by HP in connection with its lawsuit with Bausch & Lomb. *Hewlett-Packard v. Bausch & Lomb*, C 84-20642 RPA and C 86-20406 RPA. This order is drawn in substantially conformity with a similar order issued on August 1, 1988, in connection with Bausch & Lomb's motion for disqualification. Datagate has filed this motion in a belated attempt to establish grounds for an appeal. Datagate fired its legal counsel and hired a firm willing to pursue an appeal on these grounds, but because of the tardiness of its decision Datagate was forced to seek an additional thirty days to pursue this appeal. On August 10, 1988, the Court granted plaintiff the additional thirty days.

this profit sharing plan is not a proprietary interest, but could be considered a financial interest in the well being of the company beyond simply the retention of one's job. HP reports, however, that "any large non-recurring charges which are considered outside the spirit of the program" are not deducted from the profit sharing fund. HP represents that even a large adverse judgment in this case would not have impacted any HP employee's profit sharing interest.

Considering all these factors as I must, I cannot find that my son has any proprietary or investment interest in HP that would compromise my ability to render a fair decision in this case. Given the above facts, a reasonable person would not have grounds to suspect that Robert Anthony's position and interest in HP was such that it might undermine my impartiality. Therefore, I cannot find a basis for disqualification on this ground.

IV. CONCLUSION.

For the reasons stated above, Datagate's motion for disqualification is denied.

IT IS SO ORDERED.

DATED: August 11, 1988

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C 86-20018-RPA

DATAGATE, INC.,

Plaintiff,

vs.

HEWLETT-PACKARD COMPANY,

Defendant.

FILED JULY 18, 1988

ORDER OF CLARIFICATION RE PENDENT STATE CLAIMS

On July 11, 1988, the Court issued an order granting defendant Hewlett-Packard's ("H-P") motion for summary judgment and entered judgment against plaintiff Datagate, Inc. ("Datagate"). The Court omitted to mention the disposition of Datagate's four state law claims, but intended to dismiss them without prejudice. In other words, the Court intended to decline to exercise its discretion to hear the state claims. This order is intended to make clear that the state law claims are dismissed without prejudice.

Plaintiff Datagate may be concerned about the running of the statute of limitations on its state law claims. Indeed, it does appear on the face of the complaint that Datagate has serious statute of limitation problems. Nevertheless, Datagate's state law claims may be refiled in state court under the doctrine of equitable tolling. The case of *Addison*

v. State of California, 21 Cal. 3d 313 (1978), is on point and it stands for the proposition that a litigant will not be penalized for pursuing in good faith state claims in a federal forum by the application of the statute of limitations to bar the claims after their dismissal without prejudice in the federal forum. *See also Lake Nacimiento Ranch v. San Luis Obispo County*, 830 F.2d 977, 984 n.7 (9th Cir. 1987); 3 Witkin, *California Procedure* § 511 (3d ed. 1985). The California Supreme Court's decision in *Addison* remains the law of California and there is no reason to believe that a state superior court would not apply it to hear claims four through eight of the Second Amended Complaint should Datagate refile those claims in the state court.

Accordingly, the Court dismisses without prejudice claims four through eight of the Second Amended Complaint. If Datagate wishes to pursue those claims, they may do so by diligently filing a complaint in state court. If the state court refuses to hear the claims because of the running of the statute of limitations, this Court will entertain a motion by Datagate under Rule 60 of the Fed. R. Civ. P. for relief from this order.

IT IS SO ORDERED.

DATED: July 18, 1988

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

APPENDIX M

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

C.A. No. 88-15293
D.C. No. CV-86-20018-RPA

DATAGATE, INC., a corporation,
Plaintiff-Appellant,

v.

HEWLETT-PACKARD CO., a corporation,
Defendant-Appellee.

FILED OCT 28 1991

ORDER

Before: GOODWIN, SCHROEDER and BEEZER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.